Filed 12/7/09 P. v. Wilson CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM WILSON,

Defendant and Appellant.

F056440

(Super. Ct. No. FP3555A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sydney P. Chapin, Judge.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant William Wilson was found by a jury to meet the criteria for commitment as a sexually violent predator (SVP), and committed to the custody of the Department of Mental Health (the Department) for an indeterminate term, pursuant to Welfare and Institutions Code[1] section 6600 et seq., the Sexually Violent Predator Act (SVPA).

On appeal, Wilson contends the court lacked jurisdiction to conduct the SVP proceedings because the psychological evaluations filed in support of the petition for recommitment were based upon a standardized assessment protocol that was not promulgated as a regulation under the Administrative Procedures Act (Gov. Code, § 11340 et seq.) (APA). Wilson also contends the amended SVPA violated his constitutional rights to due process and equal protection and the prohibitions against ex post facto laws and double jeopardy. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Wilson has twice been convicted of felonious child molestation. In 1981, Wilson was convicted of one count of committing a lewd and lascivious act on a child under the age of 14 years (Pen. Code, § 288, subd. (a)) and sentenced to prison. He was released on parole in 1986. Then in 1991, Wilson was convicted of three counts of committing lewd and lascivious acts upon a child with force or violence (Pen. Code, § 288, subd. (b)) and sentenced to 20 years in prison.

In December 2001, Wilson was found by a jury to be an SVP and committed for two years to the Department for treatment at Atascadero State Hospital. In the years that followed, juries continued to find him to be an SVP with further commitments until December 2007.

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[1] All further statutory citations are to the Welfare and Institutions Code unless otherwise indicated.

The instant matter began on October 16, 2007, when the district attorney filed a petition in the Superior Court of Kern County to extend Wilson's commitment as an SVP. The petition was supported by recommitment evaluations prepared by two psychologists who reviewed Wilson's extensive records and reached the opinion that he met the criteria for recommitment to the Department as an SVP.

After a contested probable cause hearing (§ 6602), the court found probable cause that Wilson was likely to engage in sexually violent predatory criminal behavior upon his release. The instant appeal is from the jury trial held in October 2008, as to whether Wilson met the SVP criteria.

The People's evidence

Dr. Harry Goldberg, a licensed psychologist with a private practice, was under contract with the Department to perform SVP evaluations, and he evaluated Wilson at the Department's request. He initially evaluated Wilson in 2000. In preparation for the instant matter, he reviewed Wilson's criminal and legal records, institutional records, and mental health and psychiatric treatment records which helped form the bases for his opinions. He interviewed Wilson in 2001, 2007, and 2008.

Wilson's criminal history, related Goldberg, began in 1981 when he molested a male foster child. He was convicted for his admitted fondling and orally copulating this 13 year old; additionally, he molested a seven-year-old foster son, and a stepchild complained of being molested by him, but no conviction resulted from these acts.

After Wilson's 1981 conviction, he was determined to be a mentally disordered sex offender (MDSO) and sent to a state hospital. Wilson initially took responsibility for his conduct, but then changed his story and said the incidents never happened. Wilson was found not amenable for treatment in the state hospital, and he was resentenced to seven years in prison. Wilson was released on parole in 1986 and successfully completed his parole. He did not seek treatment during that time to address the issues which led to his conviction. He lived with his wife and worked as a truck driver.

Dr. Goldberg testified that in 1991, Wilson was again convicted, this time for child molestation accomplished by force or violence. The three offenses were based on the following facts. In 1991, Wilson befriended a family that had two sons, ages 13 and 15 years, and he developed a relationship with the boys over several months. He explained he started "grooming" the boys and eventually molested them. Goldberg noted the numerous acts of substantial sexual conduct, and that they took place over a number of months.

When he interviewed Wilson in 2007, Goldberg asked Wilson to discuss the facts of the 1981 and 1991 convictions. Wilson said he molested two boys, "the ones he was convicted of," but said he did not molest the other children and denied the allegations that did not result in convictions. Wilson said he was once molested by a family member when he was 12 years old. Wilson admitted he was aroused by children at one time but no longer felt such an attraction. Wilson also had cognitive disabilities that were not directly related to pedophilia.

Wilson initially refused to attend the sexual offender treatment program when he entered the state hospital in 2001, and he shoved and threatened the staff and patients. Wilson's problems were partly based on his cognitive disabilities. He was subsequently assessed for his cognitive issues, and the problems were addressed and accommodated. In 2005, Wilson fully entered the five-phase sexual offender treatment program in the state hospital. At the time of the instant proceeding, Wilson was in the second phase of the treatment program. Dr. Goldberg explained that even if someone reached the fifth and final phase and was released into the community, that person is very strictly monitored and ordered to attend treatment.

Goldberg noted Wilson's attitude had vastly changed since 2001, and he was more willing to accept treatment and talk about what he did, which was "quite impressive." However, Wilson was still in the initial stages of treatment. Wilson did not consciously

distort or act in a manipulative manner, but he was easily frustrated, somewhat immature, used poor judgment, and displayed temper tantrums.

Dr. Goldberg diagnosed Wilson as having a mental disorder that predisposed him to commit those types of sexual acts; he suffered from pedophilia, a sexual attraction towards children, which has a duration of six months or greater, and involves urges, fantasies, and behaviors toward children. Dr. Goldberg further testified to his opinion that Wilson was "likely to commit another sexually violent offense without appropriate treatment." His opinion was based on the use of three actuarial instruments, which combine factors associated with sexually reoffending in a mathematical way to place someone in a category for reoffending. Wilson scored a "three" on the Static 99 test, which placed him in the moderately low-risk category of being convicted of another sexual offense against a child, and in a group that had a 12 percent chance of reoffending over five years, a 14 percent chance over 10 years, and a 19 percent chance over 15 years. Wilson scored a "four" on the MNSOST-R test (the Minnesota Sex Offender Screening Tool Revised), which measured the risk the individual would be arrested for committing another sexual offense against a child, rather than whether that person would have suffered another conviction. His score placed him in the moderate-risk range and in a category with a 25 percent chance of committing another offense within six years of release. Wilson received a score of "five" on the SORAG test (Sex Offender Risk Appraisal Guide), which measured sexually violent recidivism, and placed him in a group which had a 39 percent chance of being arrested and charged with another sexual offense over seven years, and a 59 percent chance over 10 years.

Dr. Goldberg testified that Wilson's crimes were generally predatory in nature. Wilson must have known that he should not be around children after his 1981 conviction, but he placed himself in a situation where he was alone with a boy and took him on long trips, which was conducive to another act of molestation.

As for treatment, Dr. Goldberg testified Wilson was working hard and wanted to seek voluntary treatment, but he was not ready to be released and he was likely to reoffend. Wilson had immature personality traits, he never sought voluntary treatment after he was released from prison in 1986, but instead he set up a situation in which he reoffended. Wilson "represent[ed] a serious and well-founded risk to commit a crime, a sexually violent predatory offense." While Wilson said he was motivated to seek voluntary treatment, Wilson lacked the judgment, maturity, skills, and discipline to understand what kind of outpatient treatment to seek, and when treatment would no longer be necessary.

Dr. George Grosso also testified for the People. Grosso was a licensed clinical psychologist with a private practice and a member of the SVP evaluator panel for the Department. He evaluated Wilson at the Department's request, reviewed Wilson's extensive records, interviewed Wilson in 2007 and 2008, and reached his conclusions independent of Dr. Goldberg's opinion.

As to Wilson's 1991 conviction, Grosso noted that the 13-year-old and 15-year-old victims were the grandsons of Wilson's neighbor. The substantial sexual activity engaged in included acts involving both boys with him at the same time.

Additionally, Wilson told Dr. Grosso that he engaged in two homosexual relationships with cellmates while he was in prison. Wilson's treatment records at the state hospitals showed a pattern of alternating admissions and denials. He refused treatment for several years, and said he did not commit the offenses and did not gain anything from the treatment programs. Wilson also made statements to rationalize or excuse his behavior, such as saying that others were out to get him. Grosso testified that while Wilson was currently in the sex offender treatment program, he recently had a minor conflict at the state hospital and threatened to quit the program. Such conduct showed questionable judgment, impulsiveness, and the inability to solve problems.

Dr. Grosso also administered actuarial instruments and scored Wilson as a "three" on the Static 99, which meant a moderately low risk of reconviction. Wilson scored in the moderate risk category on the MNSOST-R, which measured the risk of being rearrested within six years.

Based on his review of Wilson's records, Dr. Grosso determined Wilson had pedophilia. His criminal behavior was with male children, and his offenses were predatory in nature. Grosso's opinion was that Wilson was "likely to reoffend, likely being a serious and well-founded risk." Grosso was particularly concerned about Wilson's pattern of behavioral issues. Wilson was convicted of child molestation in 1981, was found unamenable to treatment, served a prison term, was discharged on parole, and then engaged in the same type of conduct with two other boys. Wilson told Grosso that he originally believed "fondling was not molestation," and that only sexual intercourse, sodomy, or oral copulation was molestation. Wilson recently said he finally realized that molestation included other types of behavior and that he harmed others by his actions.

Dr. Grosso testified that Wilson also suffered from a cognitive disorder that affected his ability to read and write. Wilson used his cognitive problems to claim he had memory lapses and was unable to discuss the prior incidents. Wilson admitted "in a round-about way" that he molested the children in the 1981 and 1991 cases, and there were implications and suggestions that he molested additional children. Wilson stated that sometimes he felt he did not fit in, and those feelings were mitigated by his interaction with children.

Commending Wilson for starting the sexual offender treatment program, Dr. Grosso was concerned that Wilson threatened to drop out of the program over a minor disagreement and that Wilson previously used his cognitive problems as a means to "get some power and control with the hospital." Grosso testified that despite Wilson's recent realization that his conduct constituted molestation, "I don't see where anything has

changed to any substantive level." He opined that because Wilson was only in the second phase, he should be kept in custody in a secure facility to ensure the health and safety of others. Wilson's current behavioral issues demonstrated that his ability to succeed in the community would be "highly questionable."

Defense evidence

William Ellis, a behavior specialist at Coalinga State Hospital, testified he was the lead facilitator in classes which Wilson attended, starting in April 2006 and continuing to the present time. Wilson voluntarily attended classes in grief and loss; dealing with a person losing his dignity, pride, and self-respect; anger management; stages of change; and substance abuse (but he did not have a substance abuse problem). Wilson paid attention, performed his homework, and was not aggressive in group sessions. These were not mandatory classes.

Timothy Jones, a clinical social worker at Coalinga State Hospital, worked with Wilson in interpersonal skills and focus phase groups, dealing with educational challenges. Wilson's reading and writing skills were at the first grade level, but he had come a long way to improve his skills.

Dr. Jack Vogenson, a licensed psychologist in private practice and under contract with the Department to perform SVP evaluations, evaluated Wilson at the request of defense counsel. He reviewed Wilson's extensive records, including the reports from Drs. Goldberg and Grosso, and interviewed Wilson in 2008.

Dr. Vogenson agreed Wilson had been convicted of qualifying sexually violent offenses and he suffered from pedophilia. Wilson "owned up" that he had "urges in this area that he needs to be careful of." Wilson was sexually addicted to children in 1981 and 1991. Vogenson agreed Wilson's prior offenses were predatory and the victims "were not strangers. They were not people he picked up off the street or went and knew for a couple days and then offended against them." "So if [Wilson] is going to reoffend,

the offenses again would likely be predatory." However, the offenses did not involve long-term or intimate relationships that crossed the line into sexual offenses.

Dr. Vogenson testified that the diagnosis of pedophilia did not automatically mean that Wilson would reoffend. Wilson was 53 years old, and, Vogenson believed Wilson did not present a serious or well-founded risk of reoffending if he was released. Vogenson criticized Drs. Goldberg and Grosso for failing to consider Wilson's age in reaching their opinions. He observed that offenders with Wilson's characteristics do not offend at significant rates. Based on his records, Wilson had changed since he was initially committed to a state hospital, as even Goldberg acknowledged. Wilson was enthusiastic about the treatment program despite his intellectual and learning problems.

Dr. Vogenson evaluated Wilson using the same actuarial instruments used by the People's experts. He agreed with Dr. Goldberg on Wilson's scores on the Static 99 and SORAG, and "roughly agreed" with the MNSOST-R score. He described Static 99 as "the gold standard tool in cases like this." While SORAG gave a "fairly high estimate" that Wilson would reoffend, that test measured the risk for a violent sexual offense, and Wilson did not have a history of violence. The MNSOST-R offered "a more changeable view" of the person being assessed.

Wilson testified and admitted he was diagnosed with pedophilia, and it was a "lifetime diagnosis." Wilson testified he no longer had sexual urges or attractions to children. Wilson admitted that he committed the acts underlying his criminal convictions and that he was aroused when he committed those acts. Wilson admitted that he molested his older foster son, but denied molesting the younger foster son. Wilson admitted he did not seek treatment after he was released from prison, and explained he did not know that such treatment was available. Wilson admitted he subsequently molested his neighbor's grandson, but denied some of the boy's accusations and that he molested the brother. Wilson testified that if he were released, he planned to pursue outpatient treatment because he did not want his sexual desires to "act up."

After the conclusion of evidence, the jury found Wilson met the criteria for SVP commitment. The court ordered Wilson committed to the custody of the Department for an indeterminate term, pursuant to the provisions of the amended SVPA, and signed the order for his commitment.

DISCUSSION

I. Jurisdictional Challenge

Early in 2008, in an unrelated SVP matter, a petition was filed with the State of California's Office of Administrative Law (OAL), "challenging as underground regulations various provisions of the assessment protocol, which [had] been issued under the title 'Clinical Evaluator Handbook and Standardized Assessment Protocol (2007),' used by the Department to conduct section 6601 evaluations. [Citations.]" (*People v. Medina* (2009) 171 Cal.App.4th 805, 814 (*Medina*).)

On August 15, 2008, during the pendency of the instant case, the OAL issued a finding in the unrelated SVP case, and "found the challenged provisions invalid, concluding that '[t]he challenged provisions in the "Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)" issued by [the Department] meet the definition of a "regulation" as defined in [Government Code] section 11342.600 that should have been adopted pursuant to the APA.' [Citation.] Although the OAL specifically restricted its inquiry to 10 provisions within the protocol [citation], its decision effectively invalidates the operative content of the protocol." (*Medina, supra*, 171 Cal.App.4th at p. 814.)[2]

On August 22, 2008, Wilson filed a motion to dismiss the instant matter based upon the OAL's ruling, and argued the pending SVP recommitment was "based upon a

[2] According to *Medina*, the Department "has not challenged the OAL determination" and ""is revising the Protocol and handbook to adhere to the [OAL] determination and treat the protocol as a regulation, including adopting it per the APA."" (*Medina, supra*, 171 Cal.App.4th at pp. 814-815.)

state-mandated protocol which has been found to be an 'underground regulation,'" and he faced deprivation of liberty without due process of law. Wilson did not challenge any aspect of the two evaluations filed in support of the petition, but argued the OAL's ruling left the court without jurisdiction to hear the pending matter because the petition was void and invalid. The district attorney argued the OAL's ruling was not binding or persuasive and the recommitment petition should not be dismissed.

On the scheduled first day of jury trial, the court heard argument and denied Wilson's motion to dismiss. The court found the OAL's opinion in the unrelated case specifically disavowed "any evaluation of the protocol with regard to whether it's suitable or unsuitable in the context in which it was used. [This] Court is not bound by the findings of the OAL, and does not find a violation of the constitutional rights of [Wilson]." The court noted that Wilson's due process rights would be protected at the upcoming trial because he had the opportunity to call his own experts and to confront and cross-examine the People's experts. Thereafter, Wilson's jury trial began.

During the course of the jury trial, Wilson filed a motion for acquittal, partially based upon his previous motion to dismiss, and argued his due process rights were violated because the instant proceedings were based upon evaluations prepared pursuant to underground regulations. The court denied the motion.

On appeal, Wilson contends his commitment is jurisdictionally illegal and void because the SVP petition filed against him was supported by two evaluations procured by the Department that were based on underground regulations issued in violation of the APA, pursuant to the August 2008 ruling by the OAL.

"The APA requires every administrative agency guideline that qualifies as a 'regulation,' as defined by the APA, to be adopted according to specific procedures. [Citations.] The [OAL] is charged with, among other functions, enforcing this requirement. [Citations.] If the OAL is notified or learns that an administrative agency is implementing a regulation that was not properly adopted under the APA, the OAL must

investigate, make a determination, and publish its conclusions. [Citation.]" (*Medina, supra,* 171 Cal.App.4th at p. 813.)

"A regulation found not to have been properly adopted is termed an 'underground regulation.' '"An underground regulation is a regulation that a court may determine to be invalid because it was not adopted in substantial compliance with the procedures of the [APA]."' [Citations.] An OAL determination that a particular guideline constitutes an underground regulation is not binding on the courts, but it is entitled to deference. [Citations.]" (*Medina, supra,* 171 Cal.App.4th at pp. 813-814, brackets in original.)

"[P]rior to the filing of any commitment petition, the SVPA requires the [Department] to screen a person identified by prison authorities as an SVP 'in accordance with a standardized assessment protocol, developed and updated by' the Department. [Citation.] Only if two mental health professionals, applying the assessment protocol, agree that the person fulfills the criteria for an SVP does the Department request the filing of a petition. [Citations.] The purpose of this evaluation is not to identify SVP's but, rather, to screen out those who are not SVP's. 'The Legislature has imposed procedural safeguards to prevent meritless petitions from reaching trial. "[T]he requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so."' [Citation.] The legal determination that a particular person is an SVP is made during the subsequent judicial proceedings, rather than during the screening process. [Citation.]" (*Medina, supra,* 171 Cal.App.4th at p. 814.)

In the instant case, Wilson relies upon the OAL's ruling and contends the court herein should have granted his motion to dismiss the SVP petition because it was based on invalid underground regulations. Wilson further contends the court lacked jurisdiction to conduct the instant jury trial to determine whether he was an SVP, because the

underlying petition was void and invalid since it was based on the underground regulations.

However, we agree with the analysis in *Medina* that the trial court herein did not lack jurisdiction to conduct the jury trial as to whether Wilson met the criteria as an SVP. "Although [the offender] contends that the initial trial court lacked 'fundamental' jurisdiction over his petition, thereby producing a void judgment, his claim does not call into question the court's personal or subject matter jurisdiction. As to personal jurisdiction, there is no evidence to suggest, and [the offender] does not contend, that he lacked minimum contacts with the State of California [citation] or that he was not served with the documents necessary to initiate the proceedings. [Citations.] As to subject matter jurisdiction, the superior court was undoubtedly the appropriate court to hear the commitment petition [citations], and there is no claim of untimeliness. [Citation.]" (*Medina*, *supra*, 171 Cal.App.4th at p. 816; see also *People v. Glenn* (2009) 178 Cal.App.4th 778, ____ [100 Cal.Rptr.3d 685, 707-708] [evaluation based on invalid assessment protocol does not deprive the court of jurisdiction to hear the SVPA commitment petition].)

Moreover, the court's jurisdiction over an SVPA petition is invoked by the filing of the petition itself and not by the assessment evaluations. "Any noncompliance with the procedural prerequisites of the [SVPA], such as failure to have two written psychological examinations, [does] not deprive the trial court of jurisdiction." (*People v. Ward* (2002) 97 Cal.App.4th 631, 634; see also *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 894-895, 913-915 [legally erroneous evaluations may require remand for correction but do not deprive the court of fundamental jurisdiction over a commitment petition].) The requirement for evaluations "'is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so.' [Citation.]" (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063 (*Scott*).) The SVPA

does not require the petition to allege the existence of, or append, the two assessment evaluations. (§ 6601.) "Although the [Department] is required to send the two psychological evaluations to the county's designated counsel, and the designated counsel is given discretion to file a petition if he agrees with the [Department's] recommendation [citation], the statute does not by its terms require that the evaluations be alleged or appended to a petition." (*People v. Superior Court (Preciado*) (2001) 87 Cal.App.4th 1122, 1128 (*Preciado*).) "In general, the only act that may deprive a court of jurisdiction is the People's failure to file a petition for recommitment before the expiration of the prior commitment. [Citations.]" (*People v. Whaley* (2008) 160 Cal.App.4th 779, 804.)

In addition, Wilson is unable to show any prejudice from use of the noncompliant evaluation protocol. (*Medina*, *supra*, 171 Cal.App.4th at pp. 819-820 [claim that protocol's status as underground regulation undermines legitimacy of SVP commitment reviewed for prejudice]; *People v. Glenn*, *supra*,178 Cal.App.4th at p. ____ [100 Cal.Rptr.3d at p.712] [same].) Prejudice is not presumed, and Wilson has the burden of demonstrating that a miscarriage of justice has occurred. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.)

Wilson cannot show that a miscarriage of justice has occurred. First, Wilson does not contend there are any alleged deficiencies in the assessment protocol, and he has not attacked any of the tools used in the protocol, except to cite to the OAL's decision that the protocol was not adopted pursuant to the APA. The OAL's decision, however, did not suggest the protocol was flawed or unreliable as an instrument to assess whether a person might be an SVP, and it was only concerned with whether the protocol was a regulation. Indeed, the OAL's decision expressly stated it was not evaluating the "advisability" or "wisdom" of the protocol.

Second, evaluations prepared in support of an SVPA petition only serve as procedural safeguards to prevent meritless petitions from reaching trial, and do not affect disposition of the merits of the petition. (*Scott*, *supra*, 100 Cal.App.4th at p. 1063;

Preciado, supra, 87 Cal.App.4th at p. 1130.) "After the petition is filed, rather than demonstrating the existence of the two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior. [Citation.]" (*Preciado, supra*, 87 Cal.App.4th at p. 1130.) Thereafter, a new round of proceedings is triggered. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1146.) In addition, the statutory scheme does not require the People to prove the existence of these evaluations at either the probable cause hearing or the trial. (*Preciado, supra*, at p. 1130.) Thus, once the petition is filed, the People cannot rely on the evaluations but are required "to show the more essential fact" that the offender is an SVP. (*Ibid.*)

Third, there is no reason to believe that a dismissal of the instant petition on the ground that the protocol was not APA compliant would have resulted in an abandonment of the commitment proceedings in this case. Wilson does not suggest that he would not have been found to be an SVP if he was evaluated under an APA-compliant protocol, and there is no evidence to support such a conclusion.

Finally, Wilson received a fair jury trial and had the right to confront and cross-examine the People's psychologists, who testified that Wilson suffered from pedophilia, his offenses were predatory, and he was likely to reoffend. Their opinions were based on their interviews with Wilson; their independent professional training and education; the use of multiple standardized professional assessment tools; and their review of Wilson's extensive criminal, legal, mental health, and treatment records. Although the experts were guided by the standardized assessment protocol, they still relied on their own professional discretion and judgment and reached their own independent opinions. There is no suggestion in the record, and Wilson does not argue, that the experts felt constrained by the protocol or they would have reached different conclusions if they were not required to follow the protocol. The record is simply insufficient to show that a different

result was probable if the Department's protocol had been reviewed and approved through APA procedures. (See *Medina, supra*, 171 Cal.App.4th at p. 820.)

II. Constitutional Challenges

As explained *ante*, the SVPA was amended in 2006 changing the commitment term from two years to an indeterminate term. Wilson raises a series of constitutional challenges to the amended SVPA. He acknowledges that similar contentions have been rejected by numerous appellate courts. Wilson explains that he has raised these issues to preserve future review. We will briefly review and reject Wilson's constitutional contentions.

A. Due Process

Wilson contends the amended SVPA denies him due process of law under the federal and state Constitutions because it permits an indefinite commitment while placing the burden of proof on him to prove he no longer qualifies as an SVP.

A civil commitment for an indeterminate term does not violate due process. In *Kansas v. Hendricks* (1997) 521 U.S. 346 (*Hendricks*), the United States Supreme Court upheld the constitutionality of a statute that provided for an indeterminate commitment of an SVP "'until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large.' [Citation]" (*Id.* at p. 353.) The Kansas scheme provided for an annual review to determine whether continued commitment was warranted, and the committed person also could file a petition seeking to be released. (*Ibid.*) The commitment period was "only *potentially* indefinite" because of the requirement of an annual review. (*Id.* at p. 364, italics in original.)

In *People v. Taylor* (2009) 174 Cal.App.4th 920 (*Taylor*), the court relied upon *Hendricks* and rejected a due process argument similar to that raised by Wilson, and we find the following analysis persuasive. "In evaluating a due process claim, we employ the well-established three-factor test set forth by the United States Supreme Court in *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 . . . , and consider (1) the private interest

at stake; (2) the risk of an erroneous deprivation of that interest through procedures used, as well as the probable value, if any, of additional or other procedural safeguards; and (3) the state's interest, including the function involved, and the fiscal and administrative burdens that the additional or other procedural requirements would raise. [Citation.] This test applies to involuntary civil commitments. [Citations.]" (*Id.* at p. 930.)

"The private interest at stake is the deprivation of the individual's liberty, but that liberty interest is not absolute. [Citation.] The state may involuntarily commit an individual if it proves by at least clear and convincing evidence that the individual is dangerous to others due to a mental illness. [Citation.] The risk involved is that an individual may be erroneously held in a continuing commitment even though he or she is no longer a mentally ill and dangerous SVP; however, the procedures built into the amended SVPA mitigate that risk by providing for annual mental health evaluations and procedures by which an individual may seek discharge. These procedures minimize the risk of an erroneous determination." (*Taylor, supra*, 174 Cal.App.4th at p. 930.)

"The state's interest is the strong interest in protecting society from persons who are dangerous to others because of a mental disease, and the state is entitled to involuntarily commit such individuals. [Citation.] The state also has a legitimate interest in conserving scarce fiscal and administrative burdens and avoiding unnecessary relitigation of issues. [Citations.]" (*Taylor, supra*, 174 Cal.App.4th at pp. 930-931.)

"The amendments to the SVPA provide for involuntary commitment upon a showing of dangerousness due to mental illness by proof beyond a reasonable doubt. This standard is more demanding than the clear and convincing evidence standard required under federal due process principles. [Citation.] The statutory scheme further protects the civil rights of persons subject to commitment as SVP's by insuring access to discovery, legal representation, trial by court or jury, and annual postcommitment evaluations. Thus, it provides a balance between the protection of society and guarding the individual's liberty interests, as well as protecting the judicial system against

unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the mental status of the committed person by providing for indeterminate commitments. [Citation.]" (*Taylor, supra,* 174 Cal.App.4th at p. 931.)

We agree with the conclusion in *Taylor* that the amended statutory scheme, on its face, is constitutional. "The fact that the amendments shift the burden to each defendant to show they are no longer suffering from a mental illness rendering them dangerous to the public does not invalidate the statutory scheme. Adequate safeguards, including annual evaluations, are built in to insure against indefinite detention of SVP's who are no longer mentally ill or dangerous to others. [Citation.]" (*Taylor, supra,* 174 Cal.App.4th at p. 931.) In addition, many aspects of the SVPA are not new but were in effect prior to the 2006 amendments. The constitutionality of the statutory scheme adopted by California for treating SVP's was upheld by the California Supreme Court in *Hubbart*, which rejected a due process challenge to the statutory scheme (*Hubbart, supra,* 19 Cal.4th at pp. 1151-1167) and noted that a person filing a petition for discharge or conditional release had the burden of proof by a preponderance of the evidence. (*Id.* at p. 1148 & fn. 14.)

Finally, Wilson was committed to an indeterminate term after it was determined beyond a reasonable doubt that he qualified as an SVP. (§ 6604.) The Department is obliged to conduct a current examination of a committed offender at least once a year. (§ 6605, subd. (a).) If the Department determines the offender's condition has changed, then it shall authorize the filing of a petition for conditional release or discharge. (§ 6605, subd. (b).) If Wilson believes that his mental condition has changed such that he no longer qualifies as an SVP and should receive a conditional release or discharge, he has the right to file a petition under section 6608, to have counsel appointed to represent him and to seek the appointment of medical experts to evaluate him. (§6608, subd. (a).) Wilson's due process arguments are thus meritless. (*Taylor, supra,* 174 Cal.App.4th at pp. 928-931.)

B. Equal Protection

Wilson next asserts that the SVPA violates the equal protection clause of the state and federal Constitutions because it treats SVP's differently from other similarly situated individuals subject to civil commitments, including mentally disordered offenders (MDO's) committed pursuant to the Mentally Disordered Offender Act (MDOA; Pen. Code, § 2960 et seq.), persons subject to involuntary treatment under the Lanterman-Petris-Short Act (LPS Act; § 5150 et seq.), and persons committed after being found not guilty of a crime by reason of insanity (NGI's) (Pen. Code, § 1026, et seq.).

Several cases already have addressed and rejected the identical equal protection challenges. (*People v. Calderon* (2004) 124 Cal.App.4th 80, 94 [MDO's and SVP's are not similarly situated]; *People v. Lopez* (2004) 123 Cal.App.4th 1306, 1314-1315 [rejects claim of equal protection violation after analyzing MDO and SVP schemes]; *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1218-1221 [the SVPA does not violate equal protection]; *People v. Calhoun* (2004) 118 Cal.App.4th 519, 529-530 [SVP's and criminals are not similarly situated, thus no equal protection violation].) In addition, the Ninth Circuit has held that California's statutory scheme for treatment of SVP's does not violate equal protection. (*Hubbart v. Knapp* (9th Cir. 2004) 379 F.3d 773, 782 [no constitutionally significant distinction between MDO and SVP statutes].)

We again agree with the analysis in *Taylor*, *supra*, 174 Cal.App.4th 920, which rejected a similar equal protection challenge to the amended SVPA. "While SVP's, MDO's, and persons committed under the LPS Act all suffer from mental disorders, the dangers that those in each group pose have been held to be different. [Citations.] [¶] As to persons involuntarily committed after a finding of NGI, we observe that such persons have not suffered any criminal conviction, much less a conviction of a sexually violent offense, so they are not similarly situated. Because defendants have not established that they are similarly situated with persons involuntarily committed under NGI, the LPS Act,

or MDO procedures, they have not established an equal protection violation." (*Id.* at p. 936.)

C. Ex Post Facto and Double Jeopardy

Wilson next argues the amended SVPA violates the constitutional prohibition against ex post facto laws and subjects him to double jeopardy because it is punitive rather than civil in nature. The constitutional principles prohibiting double jeopardy and ex post facto laws apply only to criminal proceedings. (*Hendricks, supra,* 521 U.S. at p. 361.) It is well settled that a commitment under the SVPA is civil in nature and legally does not amount to punishment. (*People v. Vasquez* (2001) 25 Cal.4th 1225, 1231-1234.) Moreover, the Legislature has specifically determined that persons found to be SVP's "shall be treated, not as criminals, but as sick persons." (§ 6250; see also *Hubbart, supra,* 19 Cal.4th at pp. 1178-1179 [SVPA does not violate constitutional proscription against ex post facto laws because it does not impose punishment or implicate ex post facto concerns]; *People v. Chambless* (1999) 74 Cal.App.4th 773, 776, fn. 2 [SVPA is not punitive and does not impose liability or punishment for criminal conduct, and double jeopardy and cruel and unusual punishment claims fail].)

Wilson asserts these cases are not persuasive because they were decided prior to the amended SVPA's institution of an indefinite term, which renders the amended SVPA punitive in nature. However, the indefinite term does not convert an SVPA commitment from civil to punitive. Instead, the critical factor is whether the duration of confinement is linked to the stated purposes of the commitment, "namely, to hold the person until his mental abnormality no longer causes him to be a threat to others. [Citation.]" (*Hendricks, supra,* 521 U.S. at p. 363.) The SVPA's provisions for regular evaluations and conditional release ensure the commitment is limited to the duration of the offender's dangerousness.

In addition, there is nothing in the amended SVPA that authorizes or condones the involuntary commitment of individuals who are no longer mentally ill and dangerous,

and the current law ensures that a person committed under the SVPA will be released if that person's condition has changed. Thus, the SVPA is not punitive in nature, and the constitutional protections against ex post facto laws and double jeopardy, applicable only to criminal cases, do not apply to civil commitments under the SVPA. (*Taylor*, *supra*, 174 Cal.App.4th at pp. 936-937.)

DISPOSITION

The judgment is affirmed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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CORNELL, J.

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GOMES, J.